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little control.[6] Accordingly many courts will admit this evidence upon proof that the original observer is unavailable.[7]

The Missouri Court of Appeals has recently handed down even a broader decision. The plaintiff's clerk kept a book of entries made from scale tickets recording the weighing of cattle. The court not only dispensed with the testimony of the persons who made the tickets, but admitted the book under the suppletory oath of the clerk, without proof that these persons were unavailable. *Drumm-Flato Com. Co.* v. *Derlach Bank*, 81 S. W. Rep. 503. Although such a decision as this cannot be brought within any of the exceptions to the rule against hearsay, there are a considerable number of cases which seem to go as far.[8] It must be justified if at all on practical considerations. Taking into account the purely mechanical way in which the reports were probably made, and the improbability that the maker even if present would remember this one out of possibly one hundred similar transactions, it may be that the case is founded on common sense whether it be technically accurate or not.

THE CESTUI'S RIGHT AGAINST A TRANSFEREE FROM THE TRUSTEE. — Until the latter part of the fifteenth century it was the law that if the feoffee to uses enfeoffed another, the *cestui que use* had no remedy against the new feoffee.[1] So too if the feoffee died, the heir was seised to his own use.[2] The *cestui's* interest in the property was merely the personal right to call upon the trustee to convey the *res*.[3] If the trustee conveyed away the property or died, in which case he could no longer perform the obligation, the *cestui's* right was destroyed. While the courts of equity subsequently gave the *cestui* greater protection, the nature of his right was not changed. They did not make his right attach to the property, for that would make it a right *in rem* and equity acted only *in personam;* but, on equitable principles, they did create new rights, in regard to this property as against subsequent holders. These rights are not based upon any artificial doctrine of notice. It is commonly said that knowledge of facts sufficient to excite an inquiry, which would lead to a discovery of certain equitable interests, charges the person with notice of these interests;[4] and again that gross inadequacy of consideration, since it should put a purchaser upon inquiry, is sufficient to charge such purchaser with constructive notice.[5] Yet in both these cases the purchaser seems really liable because by not exercising due care he has enabled the trustee to destroy the original right which the *cestui* had against him. So too it is said that the volunteer has constructive notice.[6] The just decision in a New York case makes such a position untenable.[7] A trustee died leaving the trust property to five persons in equal parts. One of these devisees bought the shares of the others, and

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6 North Bank *v.* Abbot, 13 Pick. (Mass.) 465.
7 American Surety Co. *v.* Pauly, 38 U. S. App. 254.
8 Fields *v.* Collier, 13 Ga. 499; Nelson *v.* Bank, 32 U. S. App. 554.

1 Note, Fitz. Ab. Subp. pl. 19, cited in Ames Cas. on Trusts, 2d ed., 282.
2 Anon., Kerlw. 46 b. pl. 7, cited in Ames Cas. on Trusts, 2d ed., 282, n. 2.
3 Watts *v.* Turner, 1 Russ. & M. 634.
4 Simmons, etc., Co. *v.* Doran, 142 U. S. 417.
5 Hume *v.* Ware, 87 Tex. 380.
6 See Lewin on Trusts, 9th ed., 976, 977.
7 Giddings *v.* Eastman, etc., 5 Paige (N. Y.) 561.

the court held that he might keep the shares he had bought but must return the part he inherited. It would be absurd to hold that the defendant had notice that the estate was held in trust when he inherited the one fifth, but that he had no notice when he bought the other four fifths. The true explanation is that equity will enforce the rights of the *cestui* against any person who has obtained the trust property wrongfully or without exercising due care, or who unjustly retains it.

If the position here maintained is sound it follows that a volunteer receiving the property with the consent of the *cestui* holds free from the trust; for the volunteer's conscience cannot be charged, since he is not enriching himself unjustly at the *cestui's* expense. The *dictum* in a recent Massachusetts case was to this effect. *Matthews* v. *Thompson et al.*, 71 N. E. Rep. 93 (Mass.). The court further added that this was not an assignment or surrender of an interest in land within the Rev. Laws c. 127, § 3, providing that no estate or interest in land shall be assigned, granted, or surrendered unless by an instrument in writing signed by the grantor. This statement also seems correct. Previous to the transfer, the beneficial interest in the property was in the *cestui*. Subsequent thereto, the transferee had the beneficial interest as well as the legal title. It was urged that the *cestui* must be taken to have transferred this interest. But the *cestui's* interest, which was merely a personal right to call for a conveyance from the trustee, was destroyed when the trustee conveyed the legal title to the transferee, and since, as we have seen, equity would create for him no new right, there was nothing left for him to convey.

Recording as Constructive Notice to One Claiming no Interest in the Property. — In this country recording acts were passed from the earliest days, and their general purpose finds a far wider scope here than in England. To prevent fraud and insure openness in dealing are the objects of such statutes. The records being easily accessible, it is evident that a failure or unwillingness to inquire into them must play a determining part in working out conflicting rights. Since Twyne's case,[1] decided in 1601, retention of possession by the mortgagor has given rise to a presumption of fraud, and in many states the presumption is now conclusive.[2] So that before the recording acts, a chattel mortgagee, who allowed the mortgaged property to remain in the mortgagor's hands was liable to have his rights cut off by an innocent purchaser or creditor.[3] The recording acts gave the mortgagee, who recorded his mortgage, a right good against any one who subsequently acquired any interest in the goods from the mortgagor. This result is generally accomplished by saying that the record gives constructive notice to all the world. But to say that the filing of a mortgage gives constructive notice to all is to employ an unnecessarily broad, even a useless fiction. Was anything more purposed or effected by the mortgage recording acts, for instance, than to protect a mortgagee against subsequently acquired interests by placing knowledge within the reach of all? The whole world does not and was not intended to get notice of the recorded instrument. Thus, in several cases it has been held that a fire

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[1] 3 Coke 80 b.
[2] See Williston's Cas. on Bankruptcy, 169 n.
[3] Woodward *v.* Gates, 9 Vt. 358.